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No. 82-1175

IN THE

Supreme Court of the United States

October Term, 1982

NORBERT R. BERG, individually, and on behalf of all other persons similarly situated,

Appellants.

vs.

STATE OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES, and CARROLL D. BESADNY, its Secretary, in his official capacity,

Appellees.

On Appeal From the Supreme Court of Wisconsin

APPELLANTS' OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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Pursuant to Rule 16.5 of the Rules of this Court, Appellants hereby oppose Appellees' Motion to Affirm.

ARGUMENT

A. Substantiality of Questions Presented

Appellees admit the substantiality of the questions presented by failure to address the ultimate irony of the case. Nowhere does there appear any justification for the regula-

tory framework currently in place which allows all Wisconsin residents, many temporary residents, i.e. members of the armed services and avowed non-residents, i.e. alien secondary school students, to hunt big game on Norbert Berg's own Wisconsin land for seven to nine times less than it costs Berg to engage in the exact same activity. Any regulatory system so riddled with unjustified exceptions to the clear statutory mandate that non-residents must pay non-resident license fees clearly presents a substantial federal constitutional question. See, e.g. *Pavel v. Pattison*, 24 F. Supp. 915 (D.C.La. 1938) and *Pavel v. Richard*, 28 F. Supp. 992 (D.C. La. 1938).

Appellees inappropriately cite an appeal from a case in the South Dakota Supreme Court for the proposition that ". . . a state can completely ban non-resident hunting of certain species of game without presenting a substantial federal question . . ." Appellees' Brief in Support of Motion to Affirm, page 4. See, *State v. Kemp*, 73 S.D. 458, 44 N.W. 2d 214 (1950), appeal dismissed, 340 U.S. 923 (1951). This Court has already recognized that in the *Kemp, supra*, case the state proved that the evil sought to be remedied arose out of an overabundance of *nonresident* hunters threatening the waterfowl herd with destruction. *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 387 (1978). Wisconsin can make no such showing in this case. There is no limit on the number of big game licenses Wisconsin sells. Furthermore, Wisconsin sells 39 times more resident than non-resident deer hunting licenses. Appellees' Brief in Support of Motion to Affirm, page 6. Therefore, Wisconsin cannot prove that non-resident big game hunters are a peculiar source of evil to the big game herd since whatever evil they

represent is at least 39 times less than that posed by those whom Wisconsin chooses to classify as residents. The case of *State v. Kemp, supra,* is hence wholly inapposite.

B. Appellants' Standing to Pursue Claims

Appellees attempt to raise a non-issue to bolster a litany of irrelevant statistics and inapposite citations. As an aside, the one relevant statistic, which Appellees choose to ignore, is that Wisconsin does not now limit the number of big game hunting licenses it dispenses; rather it arbitrarily reclassifies certain non-residents as residents for big game hunting license purposes to increase revenues. That Appellants are attacking the constitutionality of the Wisconsin residency statute for big game hunting purposes is clear beyond peradventure. Wis. Stats. §29.01(8). They have cited two Wisconsin statutes which, in complete derogation of the strictures imposed by §29.01(8), confer greater big game hunting rights on certain classes of non-residents without justification nor furthering any legitimate state purposes. Wis. Stats. §§29.09(12)(a) and 29.109(2). Appellants have done so to demonstrate the unjustified inequality of treatment among similarly situated classes of people, i.e. non-residents as defined by Wis. Stats. §29.01(8). Appellants must show unjustified disparity of treatment among those similarly situated to lay a claim under the Fourteenth Amendment to the U.S. Constitution. A declaration of unconstitutionality of Wis. Stats. §29.01(8) as applied to Appellants, the relief Appellants seek, would result in being able to hunt big game at resident rates just like armed services members and alien students. Appellants seek to be treated in the same fashion as these two last-mentioned groups of hunters and they submit that a declaration of constitutional infirmity

in Wis. Stats. §29.01(8) as applied to them would accomplish exactly that end. Appellees' misguided contention that success by Appellants herein would not change their status is utterly false and should be diregarded as obfuscation of Appellant's true claim.

CONCLUSION

Appellees' Motion to Affirm is meritless. This Court should note probable jurisdiction and set this case down for full briefing and oral argument.

Respectfully submitted,

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